

July 19, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: William J. Lueckel, Jr.
Date of Filing: May 8, 2007
Case Number: TFA-0205

On May 8, 2007, William J. Lueckel, Jr. (Appellant) filed an Appeal from a determination issued by the Department of Energy's (DOE) Golden Field Office (Golden) in Golden, Colorado. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. If the Appeal were granted, Golden would be required to release the information it withheld in 11 documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

On October 26, 2006, the Appellant filed a request with Golden for "a copy of the non-proprietary Summary/Abstract of each of the proposals submitted to DOE in response to topics 2, 3, and 4" of a Financial Assistance Funding Opportunity Announcements (FOA) issued on January 24, 2006. Electronic Mail Message from William J. Lueckel, Jr., to Golden (October 26, 2006). On November 2, 2006, Golden denied the Appellant's request under Exemptions 4 and 5 of the FOIA regarding all the summaries. On December 7, 2006, the Appellant filed an appeal with the Office of Hearings and Appeals (OHA), stating that the FOA informs the applicants that the Summary/Abstract may be made available to the public. Appeal Letter dated November 28, 2006, from Appellant to Director, OHA, DOE,

at 1-2.^{1/} On January 30, 2007, OHA remanded the matter to Golden. OHA found that Exemption 5 did not apply under these circumstances, because the documents were submitted by “interested part[ies] seeking a [g]overnment benefit at the expense of other applicants.” *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 12 n.4 (2001). On remand, Golden sent letters to the submitters requesting review of the summary each had submitted. Upon receiving responses from the submitters, Golden recognized that some of the information submitted in the summaries was proprietary information and believed that under 10 C.F.R. § 1004.11 it had a duty to withhold that information. Golden then issued a second determination, in which it released 67 of the summary/abstracts in full and 11 with redactions. The redactions were made under Exemptions 4 and 6. Letter dated April 9, 2007, from Christine A. Phoebe, Assistant Manager, Office of Management and Administration, Golden, to Appellant.

On May 8, 2007, the Appellant appealed, contending that the documents he is seeking are clearly public documents. He states that the submitters are notified that the summaries may be released to the public and should not contain any proprietary or sensitive business information. Letter dated April 26, 2007, from Appellant, to Director, OHA.

II. Analysis

Golden relied on Exemptions 4 and 6 to withhold those portions of the 11 documents which were redacted.

A. Exemption 6

Exemption 6 shields from disclosure “[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to “protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a

^{1/} In its original determination, Golden relied on Exemptions 4 and 5 to withhold all the summaries. Prior to OHA’s January 30, 2007 Decision, Golden withdrew its reliance on Exemption 4. In withdrawing that reliance, it did state that “[i]n the event Golden is required to provide any of these documents in response to [the Appellant’s] FOIA request, however, DOE’s FOIA regulations still require that they be provided to the submitters for review and input regarding the applicability of Exemption 4 protected information and potential redaction.” Response Letter dated January 9, 2007, from Kimberly J. Graber, Attorney, Golden, to Steven J. Goering, OHA.

significant privacy interest would be invaded by the disclosure of the information. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the information would further the public interest by shedding light on the operations and activities of the government. See *Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Dep't of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. See *Sowell, Todd, Lafitte and Watson LLC*, 27 DOE ¶ 80,226 (August 31, 1999) (Case No. VFA-0510); *Frank E. Isbill*, 27 DOE ¶ 80,215 (July 7, 1999) (Case No. VFA-0499).^{2/}

1. The Privacy Interest

Golden determined that there was a privacy interest in the identity of the submitters' employees. We agree that a substantial privacy interest exists in the identity of private citizens due to the great potential that a commercial entity could tempt away an integral employee. The courts have also reached this conclusion. See *Sheet Metal Workers v. Dep't of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) (the disclosure of names, social security numbers, or addresses of government contractor employees would constitute an unwarranted invasion of personal privacy); *Painting and Drywall Work Preservation Fund v. HUD*, 936 F.2d 1300 (D.C. Cir. 1991) (the release of contractor employees' names and addresses would constitute a substantial invasion of privacy). Therefore, we find that there is a substantial privacy interest in the identity of the submitters' employees.

Golden also determined that there was a privacy interest in the identity of the submitters' corporate business partners. We disagree. We do not believe that a "business entity" has a privacy interest in its name or location. For that reason, we have determined that the names of business entities may not be withheld under Exemption 6.

2. The Public Interest

Having established the existence of a privacy interest in the names of submitters' employees, the next step is to determine whether there is a public interest in disclosure of the information. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773; see *Marlene Flor*, 26 DOE ¶ 80,104 at 80, 511 (August 5,

^{2/} All OHA decisions issued after November 19, 1996 may be accessed at <http://www.oha.doe.gov/foia1.asp>.

1996) (Case No. VFA-0184). The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Dep't of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). The Appellant has not demonstrated how the disclosure of the names of non-federal employees will reveal anything of importance regarding the DOE or how it would serve the public interest. Also, revealing the names of private citizens will not contribute significantly to the public's understanding of government activities. Accordingly, we agree with Golden and find that there is a no public interest in the disclosure of the names withheld pursuant to Exemption 6.

3. The Balancing Test

In determining whether information may be withheld pursuant to Exemption 6, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762; *SafeCard Service v. SEC*, 426 F.2d 1197 (D.C. Cir. 1991). We have concluded that there is a substantial privacy interest at stake in this case. Moreover, we found that there is no public interest in the release of names of the submitters' employees. Therefore, we find that the public interest in disclosure of the names withheld pursuant to Exemption 6 is outweighed by the real and identifiable privacy interest of the named individuals.

B. Exemption 4

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a trade secret, the agency must engage in a more complex analysis, as set forth in *National Parks*.

Under the *National Parks* test, the first requirement for Exemption 4 protection is that the withheld information must be "commercial or financial." Courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a "commercial interest" in them. *Public Citizen*, 704 F.2d at 1290 (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982)). Second, the information must be "obtained from a person." "Person" refers to a wide range of entities, including corporate entities. *Comstock Int'l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979). The information Golden withheld is both commercial and obtained from a person.

In order to determine whether the information is “confidential,” the agency must first decide whether the information was voluntarily or involuntarily submitted. In this case, the submitters presented the requested information to the DOE on an involuntary basis, because it was required by the grant program. Where the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

Golden alleges that release of the withheld information is likely to cause substantial competitive harm to the submitter. April 19, 2007 Determination at 3. We agree. We have reviewed the submitter’s comments and the information Golden redacted in response to those comments. The information concerns either technical information regarding the project or names of business partners of the submitters. In addition, the names of some individuals have been withheld under Exemption 6. The technical information is of a confidential nature that appears to be unique to the submitter in the way it was proposed and presented in the FOA. The disclosure of names of the business entities would allow competitors to attempt to negotiate those partners away from the submitter. Release of the information that Golden withheld would result in competitive harm to the submitter.

C. Public Interest in Disclosure

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. However, in cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. See, e.g., *Martin Becker*, 28 DOE ¶ 80,222 (May 2, 2002) (Case No. VFA-0710). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4.^{3/}

D. Appellant’s Argument

As the Appellant points out, the FOA cautions submitters that the summary may be made available to the public. Submitters are further warned not to include any proprietary or sensitive business information. *Financial Assistance Funding Opportunity Announcement*,

^{3/} Nor is such inquiry necessary with respect to information withheld under Exemption 6, because our analysis has already determined that there is no public interest in it.

Research and Development of Fuel Cell Technology for the Hydrogen Economy Funding Opportunity Number: DE-PS36-06GO96017 (issued January 24, 2006). For this reason, we are hesitant to allow withholding of the information under Exemptions 4 and 6. However, because Golden requested submitters' comments and because we have found that the deleted information satisfies the standards for withholding under Exemptions 4 and 6, we find, in this case, that Golden had a duty to withhold the information.

III. Conclusion

Golden requested and reviewed submitters' comments regarding information submitted with knowledge that it may be made public. Under these circumstances, we find it properly withheld the redacted business information, including the identities of corporate business partners, under Exemption 4. In addition, Golden properly withheld the names of submitters' employees under Exemption 6. Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

- (1) The Appeal filed by William J. Lueckel, Jr., Case No. TFA-0205, is denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: July 19, 2007